

January 2002

Terrorist Crime, Taliban Guilt, Western Victims, and International Law

Mark A. Drunbl

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Mark A. Drunbl, Terrorist Crime, Taliban Guilt, Western Victims, and International Law, 31 Denv. J. Int'l L. & Pol'y 69 (2002).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Terrorist Crime, Taliban Guilt, Western Victims, and International Law

Keywords

International Law: History, Victims, Arrest, Detention, Human Rights Law, International Relations, War

TERRORIST CRIME, TALIBAN GUILT, WESTERN VICTIMS, AND INTERNATIONAL LAW

MARK A. DRUMBL*

On September 11th, 2001, al-Qaeda terrorists attacked the United States and killed approximately 3,000 civilians from 81 countries.¹ Traditionally, international law treats armed attacks differently than criminal attacks. States launch armed attacks against other states; organized insurgency movements having some level of command or political structure also may launch internal armed attacks against state governments. Individuals or groups, on the other hand, initiate criminal attacks. The law responds to criminal attacks through investigation and trial. The law permits states to use force against other states in self-defense to armed attacks.² The September 11th attack was a war-like attack undertaken against a state by individuals from other states operating through a non-state actor that has some command and political structure.³ As such, it does not cleanly fit into either the armed attack or criminal attack category. In fact, it blurs the distinction between the two.

Unsurprisingly, the U.S. response to the attack drew from both categories. First, the U.S. argued that the Taliban harbored al-Qaeda and, consequently, the attack was an armed attack attributable to Afghanistan. Therefore, the U.S. (and its allies) had the right to initiate military strikes in collective self-defense.⁴ These strikes converted Afghanistan's internal armed conflict into an international one. The strikes and subsequent ground campaign were militarily successful, prompting the abdication of the Taliban, destruction of terrorist infrastructure and personnel, and capture of thousands of fighters.⁵ The follow-up response was one of both criminal and military justice: apprehending, detaining, and prosecuting some al-Qaeda operatives and Taliban fighters. Thus far, two prosecutorial strategies have

* Assistant Professor, School of Law, Washington & Lee University. E-mail: drumblm@wlu.edu.

1. Terrorists have not remained inactive since September 11th; there have since been devastating attacks in the Philippines, Indonesia, Yemen, Kuwait, Pakistan, Russia, and Afghanistan, some of which have been closely connected to al-Qaeda.

2. See e.g., U.N. Charter art. 51, available at <http://www.un.org/Overview/Charter/chapter7.html> (last visited Nov. 19, 2002).

3. See Mark Drumbl, *Judging the 11th September Terrorist Attack*, 24 HUMAN RTS. Q. 323 (2002).

4. See U.N. Charter, *supra* note 2, at art. 51. See also War Powers Resolution, 50 USCS § 1541 (2002).

5. See *No Remedy for Atrocities*, WASH. POST, Aug. 30, 2002, at A22. See also *Let the Rule of Justice Prevail*, THE IRISH NEWS LIMITED, Dec. 12, 2001, p. 6 (detailing the actions taken against the Taliban as well as the results); *Voice of the Times*, ANCHORAGE DAILY NEWS, Nov. 27, 2001, at B5 (discussing the impact U.S. strikes have had on Osama Bin Laden's freedom to move about Afghanistan).

emerged: U.S. federal courts or U.S. military commissions having jurisdiction only over foreign nationals. Although the commissions and their regulations contain some due process protections, as currently envisioned they do not provide defendants the same level of protection as the federal courts or the courts-martial (conducted under the Uniform Code of Military Justice).⁶ Some foreign national courts also have initiated judicial proceedings.⁷ Large numbers of terrorist suspects remain in detention in many countries world-wide.

Thus, the U.S. simultaneously wages an armed conflict while it undertakes a criminal investigation. As such, Taliban and al-Qaeda fighters were combatants for the purpose of justifying the lethal use of force. Once captured, they became criminal detainees for the purpose of criminal and military justice, although not true criminal detainees insofar as some may be tried outside the criminal justice system by military commissions and thereby avoid the due process protections given criminal defendants in U.S. courts. However, the fact that these detainees were captured as combatants in an armed conflict means that, as they become defendants facing trial, they may retain important rights, specifically the rights accorded to prisoners of war by the Geneva Conventions on the Laws of War.⁸ In February 2002, the U.S. affirmed that Taliban detainees were entitled to the coverage of the Geneva Conventions whereas al-Qaeda fighters were not.⁹ Yet the U.S. denied prisoner of war status to all detainees.¹⁰ According to the Geneva Conventions, the actual determination of whether an individual is or is not a prisoner of war is to be made by a tribunal, not unilaterally by a party to the armed conflict.¹¹ Until such a determination is made, the detainees are to be treated as prisoners of war.¹² Thus, the U.S. declaration that it is abiding by the Geneva Conventions may not be accurate, as this declaration arguably was not been followed by strict adherence to the actual terms of the Conventions.

Given that prisoners of war were formerly soldiers authorized to use force, they cannot be prosecuted for acts lawfully committed under that authorization (e.g. killing and wounding the enemy).¹³ They only can be prosecuted for activities that exceed that authorization, such as war crimes. Prisoners of war are guaranteed the right to be tried by the same courts, under the same procedure, and

6. See *How to Try a Terrorist*, N.Y. TIMES, Dec. 29, 2001, at A32.

7. See generally Frank Davies, *U.S. Has Many Choices of Courts in Dealing with Terrorists*, Knight Ridder, Dec. 19, 2001. On February 19, 2003, a Moroccan student, Mounir el Motassadeq, who provided logistical support for the Hamburg al-Qaeda cell (which included lead September 11 hijacker Mohammed Atta), was convicted in Germany of over 3,000 counts of accessory to murder and sentenced to the maximum 15 years' imprisonment.

8. See Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

9. See David Stout, *Geneva Convention to Be Applied to Captured Taliban Fighters*, N.Y. TIMES, Feb. 7, 2002.

10. See *id.*

11. Geneva Convention, *supra* note 8, art. 5.

12. *Id.*

13. See generally Ellen Lutz & Kathryn Sikkink, *International Human Rights Law In Practice: The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHL J. INT'L L. 1 (2001).

with the same appeal rights as are members of the armed forces of the detaining power.¹⁴ They are to be sentenced to the same penalties.¹⁵ There are also rights to counsel, to confer privately with counsel, to pre-trial assistance by counsel (for example during interrogation), and to call witnesses.¹⁶ While awaiting trial, prisoners of war are to be housed in the same conditions as their captors.¹⁷ In any event, regardless of their status as prisoners of war, all detainees are entitled to the protection of international human rights law, customary international law, and other treaties.

Although the rules regarding commission procedure (issued in March 2002 after a draft had been circulated in December 2001) narrowed many of the gaps between the initial construction of the commissions and international law,¹⁸ there are still reasons to fear that the planned military commissions (together with the ongoing detentions in which individuals have not yet been charged) do not fully meet these standards.¹⁹ Skirting international humanitarian law places the U.S. in a weakened position when criticizing rights violations, including those committed against Americans, in other countries. Sustained Geneva Convention violations by Iraq affecting Coalition soldiers spring to mind; so, too, do acts of perfidy undertaken by Iraqi paramilitary forces.

This mixed criminal/military response is understandable. After all, to victims, the September 11th attack certainly feels like more than just a crime. It is almost trivially true that the attack was criminal; and painfully obvious that it involved murder, injury, hijacking, and property destruction. Prosecuting terrorists under ordinary criminal law may sanitize their conduct as that of the ordinary criminal. This may be one reason why military commissions have emotional appeal.

There is, however, another option. Consideration could be given to prosecuting at least some of those responsible for the attack in an international tribunal for crimes against humanity. Crimes against humanity include acts of the ultimate despicability that are among the most serious matters of concern to the international community as a whole. In the past, the U.S. supported international prosecution for such crimes. For example, following World War II, the U.S. pushed for an international military tribunal when some Allies sought the summary execution of captured Nazi leaders.²⁰ More recently, the U.S. has strongly supported the prosecution of crimes against humanity before international tribunals

14. Geneva Convention, *supra* note 8, art. 82.

15. *See id.*

16. *See id.* at art. 105.

17. *See id.* at art. 103.

18. *See* Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002). *See generally* John Mintz, *U.S. Adds Legal Rights in Tribunals*, WASH. POST (Mar. 20, 2002).

19. *See* Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2002). *See also* E-mail from Jordan Paust, Law Foundation Professor, University of Houston to Mark A. Drumbl, Assistant Professor, School of Law, Washington & Lee University (March 21, 2002) (on file with the author).

20. *See* Laurie Cohen, Comment: *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT'L L. & FOR. AFF. 113, 123 (1997).

in many places, including Bosnia, Kosovo, Croatia, Rwanda, and Cambodia.²¹ Prosecuting September 11th as a crime against humanity recognizes both the criminal as well as war-like nature of the attack, and universally condemns terrorism in the most serious way possible. It may also eliminate the time-consuming debate whether the detainees are or are not prisoners of war.

To be sure, there are certain political advantages in proceeding through an abridged military process. These include expediency, control, incapacitation of attackers, and security. However, the military commissions may not develop a comprehensive record of terrorist conduct that fully paints the reprehensibility of this conduct. Moreover, military commissions will likely be perceived as lacking in credibility, fairness, legitimacy, and legality in many parts of the world and among audiences that we should care about. Military commission verdicts may be expedient because they abridge due process and attenuate public access. However, due process and public access help prosecutions become venues where competing narratives clash and are synthesized. This can lead to an overarching narrative that, if the trial process is viewed as credible, will itself have some legitimacy. Moreover, military commissions could prompt an externalization of martyrdom into uncontrolled political fora, such as the Islamic media, where exhortations of injustice to Muslims may resonate – unchecked – on the very public that must view terrorism as criminal and cancerous in order for it to be stamped out. Controlling these perceptions is particularly relevant as Operation Iraqi Freedom takes place.

In the cases of the former Yugoslavia and Rwanda, international tribunals have rendered lengthy, comprehensive decisions that have authenticated findings of fact and complex historical narratives, established some important truths, and worked to refute myths of ethnic, religious, and gender superiority.²² To be sure, international tribunal decisions have not always been well received in these countries and there has, at times, been a disconnect between the work of the international tribunals and the afflicted societies they were designed to assist.²³ However, with regard to September 11th, when contrasted with the perfunctory verdict issued by a military commission, international tribunals offer a greater possibility for discussion, dissensus, and neutral evaluation.²⁴ Such possibilities can help ensure that those prosecuted for September 11th are not perceived as suffering political victor's justice. These perceptions would weaken the creation of

21. See generally *War Crimes Tribunals: The Record And The Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998)

22. See generally José Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); *Symposium: The Fifth Annual Ernst C. Steifel Symposium: 1945-1995: Critical Perspectives On The Nuremberg Trials And State Accountability: Panel III: Identifying And Prosecuting War Crimes: Two Case Studies - The Former Yugoslavia And Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631 (1995).

23. This particularly is the case when the international tribunal externalizes justice for what essentially is an internal conflict, which is the case in Rwanda. See Alvarez, *supra* note 22, at 395. However, the September 11th terrorist attack is not an internal conflict, but a transnational one which, given the broad panoply of victims, aggressors, and participants, quite readily can be cast as a global crime.

24. See generally *id.*

a transnational anti-terrorism consensus.²⁵

An international criminal process captures the evil of the attack, adroitly involves the global public in eradicating terrorism, and provides the opportunity for universal cross-cultural condemnation. It also presents a number of strategic advantages over proceeding domestically. First, unlike U.S. criminal law, international criminal law has limited discovery procedures that permit sensitive information to be controlled. Second, the international tribunal could be situated in a neutral, isolated location, thereby reducing security threats to the U.S. Witnesses can testify through voice-altering technology, from behind screens, and there are no juries. Third, international tribunals have juridical experience with the thorny questions of command responsibility and conspiracy. Fourth, international prosecutions offer the benefit of coordination. The September 11th attack involved victims of multiple nationalities and was planned in multiple locations by a multinational cast of aiders, abettors, and accomplices. Responding internationally can reduce the transaction costs of coordinating various domestic proceedings. It can also bridge barriers caused by differential human rights standards among prosecuting countries. Fifth, a coordinated international approach can lay the groundwork for a global intelligence network and anti-terrorism police unit.

To be sure, there are drawbacks to international prosecutions. The number of possible defendants could challenge the capacity of international tribunals (although this could be mitigated by limiting the scope of the international tribunal to senior members of al-Qaeda). Funding could be expensive (although so are domestic trials and military commissions). Should it take too long to organize a tribunal, the impetus to stamp out terrorism could wane. Moreover, the death penalty is disfavored under international law.²⁶ This was one of the reasons why Rwanda initially opposed an international tribunal judging leaders of its 1994 genocide (where 800,000 people were murdered).²⁷ However, the U.S. was one of the major proponents of the international tribunal for Rwanda, which lacks the jurisdiction to impose the death penalty.²⁸ There is no principled reason to treat potential U.S. opposition any differently than the way Rwanda's opposition was treated. Furthermore, insisting on the death penalty in criminal or military proceedings may impede the extradition of suspects from abroad and, as may have occurred in the capital trial of Zacarias Moussaoui, may prompt tensions in international comity and relations among allies.²⁹

25. Alvarez, *supra* note 22, at 376, 458-60.

26. See Michelle McKee, *Tinkering with the Machinery of Death: Understanding Why the United States' Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 153-58, 170 (2000). See also Kristi Tumminello Prinzo, *The United States – "Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards Its Abolition*, 24 BROOKLYN J. INT'L L. 855, 856-60 (1999).

27. See Christine M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and The Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L. J. 163, 177 (2000).

28. See *War Crimes Tribunals: The Record And The Prospects: Conference Convocation*, *supra* note 21; Alvarez, *supra* note 22, at 410.

29. See *Due Process for Terrorists*, WALL ST. J., March 22, 2002 (discussing how the decision to

Moreover, shying away from the international approach means that we may be shying away from the precedent we may have created elsewhere. In the past, the United States has been one of many strong supporters of open international criminal prosecutions for atrocity in Nazi Germany, Rwanda, Cambodia, East Timor, Sierra Leone, and Bosnia.³⁰ These "civilized" international trials have been heralded as milestones in the incremental construction of a culture of human rights and rule of law that is posited as the "best" way permanently to break the cycles of violence.³¹ Although a difficult question, it needs to be asked: should the logic be any different now that Americans (along with other Westerners) predominantly are the victims? It shouldn't be, yet it is. Law and due process are now often rhetorically presented as inconveniences to the pursuit of justice, whereas in other post-atrocity situations law and due process are rhetorically presented as requirements for justice.

Whereas the legal responses to Rwandan, Bosnian, Kosovar, Cambodian, Sierra Leonean and East Timorese atrocity each were internationalized (or, in the case of Cambodia, is actively sought to be internationalized), the legal response to September 11th has decidedly not been internationalized. Despite the fact that victims come from eighty-one countries and detainees from twenty-five countries, the legal response to this tragedy has largely remained national and victim-based. Moreover, the national response (if it proceeds through the planned military commissions which strategically retain the benefits of national control without national constitutional or judicial review obligations) may in fact clash with some important precepts of international humanitarian and human rights law, thereby evidencing some sort of exceptionalism to international norms.³²

Among the reasons the international community relied upon to support international proceedings in the former Yugoslavia and Rwanda was concern that domestic proceedings in both regions would be unable to satisfy international due process concerns.³³ Yet, when the burden of victimization lies principally upon Americans in particular and Westerners in general, it seems that domestic, victim-based, and territorial prosecutions emerge as a presumptive norm and concerns with meshing these with international human rights law or humanitarian law are constructed as inconveniences or as coddling terrorists.³⁴ But did the Rwandans

pursue the death penalty against Moussaoui, the alleged 20th hijacker and a French national, in U.S. district court has sparked a negative reaction in France; more problematic, however, is the question whether some countries may be under a duty not to extradite an individual on their territory to face a possible death sentence abroad).

30. See *War Crimes Tribunals: The Record And The Prospects: Conference Convocation*, *supra* note 21.

31. See *id.*

32. See generally Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767 (1992). See also Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L. L. 1005 (1998).

33. See generally Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247 (2000). See also William A. Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523 (1996).

34. See Lee Casey, *Assessments Of The United States Position: The Case Against The*

not feel that the leaders of the genocide were coddled at the International Criminal Tribunal for Rwanda (ICTR) and that the granting of extensive due process to these individuals (which may be one reason why Ignace Bagilishema was acquitted (and released) in 2002 and Jean-Bosco Barayagwiza temporarily released in 1999)³⁵ was an inconvenience? Whereas the U.S. strongly supported an externalization of justice for Rwandans and Bosnian Muslims through the international tribunals,³⁶ the U.S. resists externalizing justice for serious international crimes, possibly even crimes against humanity, in the case of terrorism. The legal response to September 11th may demonstrate that when Westerners are victims, justice may not be externalized from the West.³⁷ However, when “others” in “far away” “tribal” societies are victimized (even if by fellow citizens), then justice for those victims may be subject to externalization in order to create international “rule of law.”³⁸

To be sure, the national judicial systems in both the former Yugoslavia and Rwanda were destroyed or seen as genuinely unable to prosecute offenders.³⁹ In fact, the principle of complementarity intrinsic to the International Criminal Court defers international prosecutions when national courts are genuinely willing or able to prosecute. Indeed, the U.S. and European national justice systems are those that would be deemed able and willing to prosecute while respecting international standards of due process.⁴⁰ Notwithstanding this ability to satisfy complementarity concerns, the United States consciously chose to contract out of its domestic judicial process and create new military commissions that may run afoul of international standards and, as such, may not be the kind of domestic mechanisms that the international community had in mind when seeking to ensure genuine domestic prosecutions.⁴¹ This is not to deny that the military commissions may be as “fair” as the normal justice systems of many countries. However, international

International Criminal Court, 25 FORDHAM INT'L L.J. 840 (2002).

35. See Hirondelle News Agency, *Rwanda; International Criminal Tribunal Chambers Judicial Recess Starts On Monday*, AFRICA NEWS, July 12, 2002.

36. See Alvarez, *supra* note 22.

37. This is not to deny that, as discussed previously, differences persist among Western nations regarding the suitability of military commissions. By and large, many European allies are more circumspect about the merits of the commissions; they also express reservations regarding the death penalty and the absence of certain procedural safeguards. However, as I have argued elsewhere, many of these differences may be more rhetorical than substantive and may represent differences of degree rather than differences of kind. See Drumb, *supra* note 3. True, allies had criticized the U.S. decision not to declare the Geneva Conventions as applicable, but when the U.S. declared them applicable while refusing actually to apply the procedural and substantive content of those Conventions, allies were satisfied.

38. See Alvarez, *supra* note 22.

39. See Tara Sapru, *Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis*, 32 TEX. INT'L. L.J. 329 (1997). See also Alvarez, *supra* note 22.

40. See Douglass Cassel, *The ICC's New Legal Landscape: The Need To Expand U.S. Domestic Jurisdiction To Prosecute Genocide, War Crimes, And Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378 (1999).

41. See generally James D. Fry, *Terrorism As A Crime Against Humanity And Genocide: The Backdoor To Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOR. AFF. 169 (2002).

institutions were designed to “take over” unless these normal justice systems could approximate international standards.⁴²

It is not as if domestic infrastructure destruction is the cause of the United States' decision to skirt domestically recognized standards of due process. Vice-President Cheney flatly insists that accused terrorists do not deserve the “same standards and safeguards that would be used for an American citizen” and that a military commission is appropriate insofar as accused individuals will be given the “kind of treatment. . . we believe they deserve.”⁴³ The President refers to detainees that await trial as “killers.”⁴⁴ Yet the United States was supportive of an international tribunal for Rwanda that gave the leaders of the Rwandan genocide treatment vastly superior to that of the Rwandan domestic criminal justice system, along with more lenient punishments.⁴⁵

Moreover criminal accountability for the Taliban has, thus far, largely been limited to the September 11th attacks. But what about the other crimes allegedly committed by the Taliban? During its rule over Afghanistan, the Taliban is reported to have terrorized Afghans through forced deportations, massacres, torture, extra-judicial executions, and enforced disappearances among prisoners.⁴⁶ Shia Muslims were persecuted.⁴⁷ The Taliban established a system of gender apartheid.⁴⁸ There were many allegations of state-sponsored sexual crimes and rape.⁴⁹ In addition, the Taliban embarked on deliberate destruction of cultural property (e.g. the ancient Bamiyan Buddhas and objects d'art in the National Museum in Kabul).⁵⁰ The international community did not intercede in Afghanistan while these crimes were occurring. Early intervention to protect

42. See generally Alvarez, *supra* note 22; see also Carroll, *supra* note 27, at 193.

43. See Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

44. See Katharine Q. Seelye, *Rules Set on Afghan War Prosecutions*, N.Y. TIMES, Mar. 21, 2002, at A1.

45. See Schabas, *supra* note 33, at 551-52 (illustrating that whereas Rwandan domestic courts have awarded the death penalty, the ICTR is not empowered to do so; thus, the leaders of the Rwandan genocide, over whom the ICTR has custody, are entitled to more advanced procedural protections and avoid the death penalty, whereas the “lower-down” offenders in the custody of the Rwandan government have less procedural protection but face more severe sentences).

46. See Ossai Miazad, *Transitional Justice in Post-war Afghanistan*, 9 HUM. RTS. BR. 2, 2-6 (2002). See also David Treyster, *The Taliban May No Longer Control Afghanistan, but Their Persecution of Religious Minorities Will Forever Remain a Stain on Global History*, 18 N.Y.L. SCH. J. HUM. RTS. 527, 527-532 (2002).

47. See Treyster, *supra* note 46, at 529.

48. See generally Alicia Gaica, *No Freedom for Afghan Women: The Taliban Hides Behind Religion To Control Its People*, 78 U. DET. MERCY L. REV. 341 (2001). See also Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293 (1998); Shannon Middleton, *Women's Rights Unveiled: Taliban's Treatment of Women in Afghanistan*, 11 IND. INT'L & COMP. L. REV. 421 (2001).

49. Mark Drumbl, *Put the Taliban on Trial – In Afghanistan; U.N. – Assisted Tribunals*, ROANOKE TIMES & WORLD NEWS, Dec. 2, 2002, at A13.

50. See Drumbl, *supra* note 49, at A13; Treyster, *supra* note 46, at 532. See also Steven Wilf, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: What is Property's Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT'L L. 177 (2001).

suffering Afghans may have impeded the symbiotic growth of al-Qaeda and Taliban power.

If proven, some of these crimes would constitute violations of customary international law. Others would constitute gross human rights offenses, namely serious violations of international humanitarian law and international human rights law that, in turn, qualify as crimes under international law. Others would infringe a number of international treaties and conventions. Full justice for all victims of Taliban barbarity may therefore require more criminal prosecutions. True accountability would oblige the Taliban to answer to these charges in addition to complicity in the September 11th attack.

Who should prosecute these alleged crimes? Where should they be adjudicated? For example, could U.S. federal courts exercise universal jurisdiction to adjudicate criminally regarding torture? Alternately, there is a possibility of civil lawsuits involving breaches of the law of nations undertaken pursuant to the federal Alien Tort Claims Act or Torture Victim Protection Act.⁵¹ Given the difficulties that inhere enforcing any actual damage award, these claims could be limited to providing victims with symbolic justice. Foreign national courts – in particular, in Belgium, Switzerland and Germany – have been active in exercising universal jurisdiction to criminally prosecute human rights abusers.⁵² The planned U.S. military commissions appear unable to exercise universal jurisdiction over the Taliban's "other" crimes.⁵³ In all cases, and regardless of jurisdictional possibilities, it appears doubtful that there is a political commitment to pursue these crimes in the U.S. or through military prosecutions.⁵⁴

Perhaps an international tribunal created by the Security Council would be appropriate. Alternately, these may be the kinds of crimes that U.N.-assisted tribunals in Afghanistan should address. Such tribunals could involve Afghan jurists and inclusively invoke Afghan custom, Islamic law, and public international law. In this vein, perhaps prosecutions of al-Qaeda operatives should be viewed differently than those of Taliban officials. Although the U.S. legitimately asserts a strong interest in prosecuting al-Qaeda operatives committing attacks within the U.S., and the international community calls for the condemnation of terrorism as a crime against humanity, it seems that Afghanistan is the place with the greatest interest in prosecuting Taliban leaders for their overall pattern of criminality. Such prosecutions could form an important part of nation-building in Afghanistan. They could also help to construct a domestic judicial system, thwart the impunity that has marked much of Afghan history, and promote the rule of law. They could also

51. See Torture Victim Protection Act of 1991, 28 U.S.C.S. § 1350 (2002).

52. See Beth Van Schaack, *International Law Weekend Proceedings: The Civil Enforcement of Human Rights Norms In Domestic Courts*, 6 ILSA J INT'L & COMP L 295, 296-98 (2000). See also Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 TRANSNAT'L LAW. 357 (2002).

53. See Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction Of Military Commissions and The Ambiguous War On Terrorism*, 96 A.J.I.L. 345 (2002).

54. See generally Paust, *supra* note 19.

form an important forum in which globalized human rights law is sedimentarily layered upon Islamic law (as locally followed) in which both meet as “equal strangers” and thereby build a universal rule of law. One of the greatest challenges of human rights law is shedding its perceived status as a Western meta-narrative to which other local narratives are subaltern. Prosecuting the Taliban’s international crimes committed locally in Afghanistan against Afghans could be a thoughtful exercise in this reconciliation and harmonization process.

The Taliban’s “other” crimes, committed systematically over a number of years, should not be overlooked. Giving succor to terrorists is only one part of the Taliban’s litany of criminality. In avenging our own victimization we should not brush aside the many other victims. It would be unfair for us to exercise primacy and exclusivity over captured Taliban officials and try them only for the September 11th attack. Doing so “hides” the Taliban’s crimes when committed against “others” as opposed to “us.” Instead, we should endeavor to coordinate our needs for justice with those felt by others. Only then would the Taliban face a thorough accounting.

In conclusion, legal responses to the September 11 attack could operate at a multiplicity of levels. Senior al-Qaeda leaders could face an international tribunal charging them with crimes against humanity. Lower-level terrorists could be processed through national court systems adjusted for national security concerns. Taliban officials could face the Afghan people they have brutalized in U.N. assisted tribunals integrated with the process of Afghanistan’s reconstruction and stabilization. This polycentric approach may strike an effective balance among various goals, namely punishing terrorists, deterring future breaches, protecting national security interests, demystifying terrorist mystique, and constructing multi-ethnic governance in Afghanistan. Such a process can also establish linkages between Islamic and Western legal communities. On the other hand, summarily prosecuting in military commissions may erode the rule of law that painstakingly – drop-by-drop and bit-by-bit – has been built since Nuremberg. Ultimately, this erosion may be precisely what terrorists perversely hoped for.

In thinking about how we respond to terrorism today, we need to be mindful of the future effects our actions have on legalism and international rule of law. The post-Nuremberg era has seen the gradual emergence in international relations of what political theorist Judith Shklar calls “legalism” – “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”⁵⁵ Legalism includes an important element of process and has come into play even “when so doing has greatly complicated international diplomacy.”⁵⁶ Law has attempted, principally through the vehicle of international human rights and international criminal law, to answer complex problems of violence, hatred, and aggression. The reaction to massacre in Yugoslavia, Rwanda, Cambodia, and East Timor has been legalist, despite the fact

55. See generally JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1 (1986).

56. See GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 20, 24, 280 (2000).

that “this legalism may sometimes seem eccentric [or] absurdly pious.”⁵⁷ Response to the atrocity of September 11th – whether on the level of modifying the rules regarding self-defense, avoiding strict adherence to Security Council approval of the use of force, demonstrating diffidence regarding the Geneva Conventions, or the exceptional use of military commissions – may signify a movement away from legalism.

57. BASS, *supra* note 56, at 281.